OA 4-7-94

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLANIGAN'S ENTERPRISES, INC.
Petitioner,

vs.

CASE NO. 81,563 (DCA No. 92-104)

BARNETT BANK OF NAPLES, et al.
Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

FIFTH DISTRICT

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PRELIMINARY STATEMENT

Throughout this Answer Brief, Petitioner, FLANIGAN'S ENTERPRISES, INC., shall be referred to as "FLANIGAN'S," and Respondent, BARNETT BANK OF NAPLES, shall be referred to as "BARNETT BANK."

References to pages of the Record on Appeal shall be designated by (R.___), and references to Exhibits shall be designated by (Ex.___), with the respective page(s) and/or line(s) of the Record on Appeal or Exhibit indicated.

STATEMENT OF THE CASE

BARNETT BANK adopts the Statement of the Case of FLANIGAN'S, with the following changes, additions, or clarifications:

1. This case was tried before the Honorable Lawrence R. Kirkwood in a nonjury trial on September 18 and 20, 1991. The cause of action tried was FLANIGAN'S claim for damages asserted in Count II of the Fourth Amended Complaint (R. 369) that BARNETT BANK violated § 818.01, Florida Statutes, by disposing of the bank's collateral (a 4-COP liquor license, License Number 58-312) from its debtor Level III of Orlando, Inc. ("Level III") against which FLANIGAN'S asserted a landlord's lien;

2. Before trial, on April 22, 1991, the trial court entered its Order on Plaintiff's Motion for Partial Summary Judgment, and Defendant's Motion for Final Summary Judgment (R. 540), finding that "all elements of the cause of action [Count II] have been established" (R. 540), and the case proceeded to

trial on the defenses of estoppel, laches, and waiver, and the issue of damages (R. 570); and

3. On October 10, 1991, the trial court entered its Findings of Fact (R. 641) and Final Judgment (R. 645) in favor of BARNETT BANK on that basis that "[BARNETT BANK] has established by clear and convincing evidence that [FLANIGAN'S] claim is barred by estoppel and the evidence is not ambiguous or susceptible to two constructions" (R. 641). Accordingly, the trial court entered judgment for BARNETT BANK, and FLANIGAN'S appealed to the Fifth District Court of Appeal (R. 660). BARNETT BANK filed a cross-appeal of the trial court's Order ruling that § 818.01 applied to BARNETT BANK'S disposition of the collateral (R. 664).

4. The Fifth District Court of Appeal affirmed the final judgment of the trial court for two reasons: (1) the record adequately supported the trial court's finding of estoppel; and (2) §818.01 afforded no basis to assert civil liability against BARNETT BANK.

5. FLANIGAN's filed its appeal of the District Court's ruling on April 15, 1993, and BARNETT BANK contested the assertion of conflict jurisdiction on the bases that the acknowledged conflict concerning the applicability of §818.01 between the Fifth District's opinion and the opinions of the Third and Fourth District Courts was "dicta conflict," and more importantly because the outcome of the trial court's judgment would not change even if the Fifth District were wrong about §818.01, since BARNETT BANK had also prevailed on the issue of estoppel.

STATEMENT OF THE FACTS

BARNETT BANK adopts the Statement of the Facts of FLANIGAN'S, with the following changes, additions, or clarifications:

1. FLANIGAN'S and Level III entered into a Sublease Agreement (R. 675, Ex. 2) which granted FLANIGAN'S a "security interest in and to the liquor license [License Number 58-312], furniture, fixtures, equipment and business goodwill being sold . . . ." as security for performance of the Sublease and the Prime Lease (R. 675, Ex. 2, p. 2). No references were made in the Sublease Agreement to any rights arising under § 83.08, Florida Statutes, or to statutory landlord's liens;

2. FLANIGAN'S did not take adequate affirmative steps to perfect its security interest in the Liquor License. It never recorded the Sublease Agreement (R. 146). FLANIGAN'S normal procedure when liquor licenses were pledged was to prepare and record U.C.C. financing statements to perfect its security interest; however, in this case, the U.C.C. financing statements were prepared and forwarded to be executed, but were never returned (R. 147). Finally, FLANIGAN'S failed to record its interest with the Division of Alcoholic Beverages (R. 147);

3. On April 8, 1983, Level III granted BARNETT BANK a security interest in various items of personal property, including the Liquor License, as security for a loan. As part of its due diligence in making the loan and perfecting its security interest in the Liquor License, BARNETT BANK wrote to the Division of

Alcoholic Beverages and ran a "U.C.C. encumbrance search" to see if there were any encumbrances on the Liquor License (R. 70). These investigations revealed that there were no lien filings against the Liquor License (R. 82);

4. F. Joseph McMackin III, Esquire, ("McMackin") , a lawyer with the firm of Quarles & Brady, in Naples, Florida, represented BARNETT BANK in the loan transaction involving the Liquor License (R. 78). It was his opinion based upon the encumbrance search that BARNETT BANK'S security interest was in a first lien position on the collateral (R. 82);

5. When the loan was made by BARNETT BANK, the Bank sent FLANIGAN'S a standard landlord's lien waiver used by the Bank when requesting a waiver as to "tangible property," meaning "inventory, furniture and removable fixtures and equipment such as cash registers" (R. 67, 84). FLANIGAN'S, in responding to this specific request, refused to execute the waiver, stating it did not "wish to waive its landlord's lien against the property at this location, which is FLANIGAN'S only security for timely payments . . . ." (R. 675, Ex. 7) (emphasis added);

6. The loan from BARNETT BANK went into default in early 1984, and the Bank started trying to liquidate collateral at that time (R.114). On July 14, 1984, LEVEL III surrendered the Liquor License to BARNETT BANK as part of the liquidation process (R. 70). Prior to accepting the Liquor License, BARNETT BANK again checked to see if there were any lien filings and found there were none (R. 90). After the surrender, BARNETT BANK placed the Liquor

License in escrow with the Division of Alcoholic Beverages (R. 87) and began trying to sell it;

7. On August 15, 1984, BARNETT BANK and Hickory Point Industries ("Hickory Point") began negotiating for the purchase of the Liquor License (R. 70). On September 28, 1984, BARNETT BANK and Hickory Point reached an oral agreement on a price of $110,000.00 for the Liquor License and a deposit was made (R. 91, 92). On October 10, 1984, BARNETT BANK entered into an Agreement with Hickory Point for the sale of the Liquor License (R. 675, Ex. 16);

8. Between September 28 and October 10, 1984, McMackin was contacted by Jeffrey D. Kastner, Esquire ("Kastner"), the general counsel for FLANIGAN'S (R. 93). Kastner handled Liquor License matters for FLANIGAN'S at that time (R. 124);

9. As correctly noted by FLANIGAN'S in its Initial Brief, there is a disagreement as to what was said in this one, and only, conversation between McMackin and Kastner. According to McMackin, Kastner advised he represented the landlord, FLANIGAN'S, and that his client had a perfected security interest in the Liquor License (R. 94);

10. According to McMackin, Kastner later admitted that FLANIGAN'S "dropped the ball" by not filing its U.C.C. financing statement (R. 94). Kastner then advised McMackin that FLANIGAN'S did not "really want to cause any trouble" and proceeded to offer $95,000.00 to purchase the Liquor License from BARNETT BANK (R. 94);

11. McMackin believed that the unfiled and unperfected security interest of FLANIGAN'S was subordinate to BARNETT BANK's interest (R. 105). Further, since the amount of FLANIGAN'S offer was below that of Hickory Point's, McMackin did not accept the offer (R. 95), but he took the offer under advisement and stated he would get back to Kastner if the Bank were interested (R. 95). McMackin never called Kastner back because the transaction with Hickory Point closed (R. 98);

12. At no time during the conversation did Kastner ever mention a landlord's lien (R. 96). McMackin testified that he was not aware that landlord's liens arising under § 83.08, Florida Statutes, would have attached to intangible personal property, including the Liquor License (R. 83). Had a claim based upon a landlord's lien been raised, McMackin would have researched the issue of a priority claim based upon a landlord's lien against a liquor license, and he would have told the Bank that it had a problem with the priority of its security interest (R. 97, 104). If BARNETT BANK had been aware of such a claim and the legal basis for it, BARNETT BANK would not have transferred the Liquor License to Hickory Point (R. 104);

13. In transferring the Liquor License to Hickory Point, BARNETT BANK had no plan or design to improperly sell, or conceal the sale of, the Liquor License to defeat any claim of FLANIGAN'S (R. 114). It took almost an entire year to sell the Liquor License (R. 115);

14. After the phone conversation between Kastner and McMackin, Kastner wrote several letters setting forth the basis of FLANIGAN'S claim to the Liquor License:

a. On December 6, 1984, Kastner wrote McMackin and stated, "While the Liquor License was pledged to FLANIGAN'S pursuant to the terms of the Sublease Agreement, no U.C.C. or lien with the Beverage Department was ever filed of record" (R. 675, Ex. 19) (emphasis added). A claim based upon a landlord's lien was not specifically mentioned (R. 152);

b. On February 5, 1985, Kastner wrote the Division of Alcoholic Beverages and stated, "FLANIGAN'S was granted a security interest in the Liquor License to secure payment of rent and all other obligations of the Sublease Agreement," and stated the Liquor License had been "pledged" (R. 675, Ex. 21) (emphasis added). Further Kastner argued BARNETT BANK was aware of the security interest granted in the Sublease Agreement because BARNETT BANK had requested a waiver of the landlord's lien as to "furniture, fixtures and equipment," which meant the Bank "was aware of the existence of the Sublease" (R. 675, Ex. 21). Kastner readily admitted the letter did not mention landlord's liens (R. 154). In fact, Kastner claims he intentionally did not mention landlord's liens to the Division to "protect our interest" (R. 154); and

c. On March 14, 1985, Kastner wrote McMackin again and stated:

> At that time I advised you that pursuant to the Sublease Agreement for the above referenced location, the liquor license was pledged to Flanigan's as security for the payment of rent. Due to the fact that a request was made of Flanigan's to waive its landlord lien against the furniture, fixtures and equipment at this location prior to the transfer of the assets to Spirits of Orlando South, Inc., your client had to be on notice of the pledge of this license to Flanigan's for payment of rent under the Sublease Agreement (R. 675, Ex. 22) (emphasis added).

The purpose of the letter was to "refresh" McMackin about what they had talked about earlier (R. 156), and yet, Kastner did not mention a claim based upon a landlord's lien. Kastner admitted that it "definitely would have helped to have been more specific on our landlord claim" (R. 157);

15. Kastner admitted that in all three letters not a word about a claim based upon a landlord's lien was mentioned (R. 158); and

16. FLANIGAN'S first made an explicit claim based upon a landlord's lien in the initial Complaint filed against BARNETT BANK on September 20, 1985, eight months after the sale to Hickory Point had closed.

SUMMARY OF ARGUMENT

The District Court correctly found that §818.01, Florida Statutes, did not afford FLANIGAN'S a basis for relief against BARNETT BANK for having disposed of the Liquor License. The notice provisions of §818.01 conflict with the provisions of the U.C.C. (e.g., §697.504); therefore, the Legislature impliedly repealed §818.01 in the context of sales of collateral by lienholders.

Even if §818.01 applied in the context of sales of collateral by lienholders the trial court still properly found FLANIGAN'S claim was barred by estoppel. The trial court's Findings of Fact and Final Judgment based thereon are presumed correct. These decisions should not disturbed unless there is no competent evidence to support them. Since the trial court had the opportunity to evaluate and weigh the evidence, an appellate court cannot substitute its judgment for that of the trial court.

The elements of an estoppel were proven by clear and convincing evidence at trial. The elements of an estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming the estoppel caused by the representation and reliance. The evidence adduced at trial clearly proved the elements of estoppel in that:

1. FLANIGAN'S made a representation to BARNETT BANK that was contrary to a later-asserted position by making a claim to

the Liquor License based upon an unperfected "security interest" which was clearly subordinate to BARNETT BANK'S security interest, and then later by making a claim in this lawsuit based upon a statutory landlord's lien arising under Chapter 83, Florida Statutes;

2. BARNETT BANK reasonably relied upon the representation by FLANIGAN'S general counsel that its claim to the Liquor License was based upon a "security interest" without ever mentioning a claim based upon a landlord's lien; and

3. BARNETT BANK changed its position to its detriment by disposing of the Liquor License after considering and rejecting FLANIGAN'S claim to the Liquor License based upon a "security interest," which BARNETT BANK correctly considered subordinate to the bank's interest.

Even if the Court finds BARNETT BANK violated §818.01 by disposing of the Liquor License, and finds that there is no competent evidence of an estoppel, FLANIGAN'S damages, if any, are still limited to the amount of rent owing at the time the Liquor License was removed from the leased premises.

ARGUMENT

This appeal presents an anomalous fact situation involving a creditors' priority contest between BARNETT BANK'S perfected security interest and FLANIGAN'S unrecorded landlord's lien on the Liquor License of Level III. This situation is unusual because FLANIGAN'S landlord's lien arose before the enactment of §561.65(4), Florida Statutes, which since July 1, 1981, has required all liens or security interests to be recorded with the Division of Alcoholic Beverages in order to be enforceable. This section "grandfathered in" liens or security interests existing prior to that date. Section 561.65(1), F.S.

This Court accepted jurisdiction of this case under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to review a decision of the Fifth District Court of Appeal that §818.01, afforded no basis for civil or criminal liability against a secured creditor which disposes of collateral without the written consent of another lienor. The District Court expressly and directly acknowledged its decision conflicted with the decisions of Ford Motor Credit Company v. Hanus, 491 So.2d 570 (Fla. 4th DCA 1986), and Littman v. Commercial Bank & Trust Company, 422 So.2d 636 (Fla. 3d DCA 1983), concerning the issue of the applicability of §818.01.

Although the District Court acknowledged this conflict, its affirmance of the trial court's final judgment in favor of BARNETT BANK was principally based upon its finding that the record sufficiently supported the trial judge's conclusions that FLANIGAN'S was estopped from asserting a landlord's lien against

the Liquor License as a basis for liability under §818.01. However, the District Court then continued, addressing the issue of whether §818.01 even applied in situations regarding the sale of collateral by secured creditors, though the consideration of this issue was not essential to the ultimate ruling.[1]

BARNETT BANK will address the issue concerning the applicability of §818.01 first since it is the basis for the conflict jurisdiction, then later address the issues of estoppel and damages.

I. THE APPELLATE COURT CORRECTLY FOUND THAT §818.01 AFFORDED FLANIGAN'S NO BASIS FOR RELIEF AGAINST BARNETT BANK'S FOR DISPOSING OF THE LIQUOR LICENSE.

The District Court found that §818.01 should not be applied in the context of sales of collateral by secured creditors because that statute conflicts with the provisions of the U.C.C. (e.g., §679.504(3)) and other similar statutes permitting the disposition of collateral. FLANIGAN'S, in its Initial Brief, acknowledged "679.504(3) cannot be reconciled with 818.01 in the context of sales of collateral." The District Court in reconciling this conflict found that §818.01 had been impliedly repealed by these

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[1] As BARNETT BANK previously pointed out in its Respondent's Brief on Jurisdiction, the District Court's decision did not rest upon the issue of the interplay between §818.01 and §679.504. Its resolution of this issue was superfluous to the outcome and may even be considered *obiter dictum*. Consequently, this Court could still relinquish its discretionary conflict jurisdiction. See The Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988); Pinkerton-Hays Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961); and State v. Speight, 417 So.2d 1168, 1169, n. 1 (Fla. 1st DCA 1982).

other statutes governing the disposition of collateral by inferior or superior creditors.

The District Court correctly noted that if §818.01 applied to situations where inferior secured creditors disposed of collateral this would undermine the comprehensive collateral disposition rules of the U.C.C. For example, it has long been recognized in Florida that inferior secured creditors can dispose of collateral subject to superior security interests. See Coney v. First State Bank of Miami, 405 So.2d 257 (Fla. 3d DCA 1981). Noted authors White and Summers, in their treatise Uniform Commercial Code Third Edition, Vol. 2, p. 593, addressing the effect of sales of collateral by inferior secured creditors, have stated:

> But suppose the senior secured party does not take over and control the foreclosure sale. Is his security interest similarly cut off by the sale? Here the answer is 'no', because the first sentence of 9-504(4) only discharges security interests *subordinate* to the interest of the foreclosing creditor. Thus the collateral is, in effect, always sold at such a foreclosure *subject to* any *senior secured party claims*. And, of course, if such claim is then known, this will affect the price which the purchaser pays at the sale.

Other states have recognized the rights of inferior secured creditors to dispose of collateral without recriminations from prior lien creditors. See Continental Bank v. Krebs, 184 Ill.App.3d 693, 133 Ill.Dec. 157, 540 N.E.2d 1023, 10 UCC2d 246 (1989); United States v. Cohoon, 11 UCC2d 316 (E.D.N.C. 1990); and Chadron Energy v. First National, 236 Neb. 173, 459 N.W.2d 718, 12 UCC2d 1183 (1990).

The conflict between §818.01 and the U.C.C. can be resolved using traditional rules of statutory construction. The general rule is "[w]hen statutory provisions are irreconcilable, . . . the general rule is that specific statutes on a subject take precedence over another statute covering the same subject in general terms." Littman, 425 So.2d at 636. As the District Court noted, §818.01 is a very old statute which first appeared in 1893. The statute has remained basically intact since then other than a minor revision in 1971 when the prescribed punishment was increased to a first degree misdemeanor. In comparison, in 1965 the Florida Legislature adopted Florida's version of the Uniform Commercial Code establishing a comprehensive system for commercial transactions, including the rights to secured parties to dispose of collateral. Florida's U.C.C. underwent several major substantive changes in 1972, 1979, and 1989, and even more recently with respect to Articles 3 and 4, and none of these changes have impinged upon a secured creditor's basic right to dispose of collateral. Therefore, it is reasonable to conclude, as did the District Court, that the Legislature intended to keep the lien enforcement rights of secured creditors intact and impliedly repealed the restrictions of §818.01.[2]

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[2] BARNETT BANK argued to the trial court and the District Court that §818.01 did not even apply to the disposition of intangible personal property, such a liquor license, because the language of the statute implies only tangible property is considered. Moreover, the cases finding a private cause of action under §818.01 only dealt with tangible personal property.

FLANIGAN'S mistakenly asserts that the conflict between §818.01 and the U.C.C. can be reconciled by realizing FLANIGAN'S interest arose by operation of law under §83.08 (landlord's lien), which is not governed by the U.C.C. This argument completely misapprehends the nature of the conflict here. BARNETT BANK is not asserting that FLANIGAN'S landlord's lien, if any, is governed by the U.C.C. Clearly, the U.C.C. excludes such liens from its field of operation; see §679.104 (2); and there are already clear rules establishing the lien priority as between non-U.C.C. landlord's liens and U.C.C. security interests.[3] Nor is BARNETT BANK suggesting that FLANIGAN'S could not have an enforceable landlord's lien in situations where a competing U.C.C. secured creditor holds lien rights. To the extent those landlord's lien rights exist, and have not already been waived or precluded by estoppel as was the case here, they are not denuded merely by limiting the application of §818.01.

FLANIGAN'S attempts to harmonize the application of §818.01 and the U.C.C. on Page 24 of its Initial Brief by suggesting that the Court apply §818.01 "only in cases involving non-consensual liens," which apparently means FLANIGAN'S wants the court to apply the statute to protect landlord's liens alone. However, FLANIGAN'S construction does not harmonize the conflict between §818.01 and the U.C.C. at all. It simply asks the court to

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[3] See, e.g., G.M.C.A. Corporation v. Noni, Inc., 227 So.2d 891 (Fla. 3d DCA 1969); Sachs v. Curry-Thomas Hardware, 464 So.2d 597 (Fla. 1st DCA 1985); and United States v. S.K.A. Associates, Inc., 600 F.2d 513 (1979).

ignore the obvious conflict. Rather than giving a "field of operation" to both statutes, as FLANIGAN'S suggests, all this does is protect landlord's liens at the expense of destroying the secured creditor's lien enforcement rights, thereby exacerbating the effect of the conflict.

FLANIGAN'S argues that it is not "fair" to apply the provisions of the U.C.C. to adjudicate the rights of those possessing landlord's liens, but limiting the application of §818.01 is not such an adjudication. The Fifth District's holding does not upset the balance of priorities between U.C.C. secured creditors and parties asserting landlord's liens which are already established by the common law's "first in time, first in right" approach. See n. 3, supra.

Furthermore, FLANIGAN'S argument that such a policy would "have a devastating effect on the rights of landlord lienholders" is exaggerated. Merely allowing a secured creditor to dispose of collateral encumbered by a landlord's lien does not automatically wipe out the lien as FLANIGAN'S submits. In those situations where a party holds a senior landlord's lien, the disposition of the collateral by a junior secured creditor would be subject to the senior landlord's lien, and the landlord could enforce its lien rights by a writ of distress, replevin, or foreclosure. It is only in those rare cases where there is an intervening bankruptcy that the landlord's lien is jeopardized, and that risk already exists in those situations when the collateral is never transferred or disposed of but the original tenant files for bankruptcy protection.

FLANIGAN'S would have the court believe that by limiting the application of the §818.01 there will be a glut of cases where inferior creditors cut off a landlord's lien rights by transferring collateral without the landlord's consent. This simply will not be the case as landlord's liens will be as protected as much as they ever were. The only really devastating effect will be if the rights of secured creditors to enforce lien rights are abrogated by an overly broad application of §818.01.

II. EVEN IF §818.01 APPLIES TO THE DISPOSITION OF COLLATERAL BY SECURED CREDITORS, THE DISTRICT COURT'S DECISION WAS STILL CORRECT BECAUSE FLANIGAN'S WAS ESTOPPED FROM ENFORCING ITS LANDLORD'S LIEN.

After a trial over two days during which FLANIGAN'S and BARNETT BANK presented evidence, the trial court entered its Findings of Fact, finding that BARNETT BANK had established by clear and convincing evidence that FLANIGAN'S was estopped from recovery because it failed to properly notify and timely assert a landlord's lien (R. 641). The bulk of FLANIGAN'S appeal attacks this finding.

It is a fundamental principle of appellate procedure that a decision or judgment of the trial court is presumed correct until reversible error has been shown by the party seeking review. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). The presumption of correctness is much more difficult to overcome when the decision being reviewed is based entirely upon a disputed issue of fact, and factual decisions will not be disturbed absent a showing that there is no competent evidence to support the decisions. Wales v. Wales, 422 So.2d 1066 (Fla. 1st DCA 1982).

This is because the trial court has the opportunity to "evaluate and weigh the testimony and evidence based upon [an] observation of the bearing, demeanor and credibility of the witnesses." Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976), on remand 336 So.2d 1282 (1976). Further, an appellate court cannot substitute its judgment for that of the trial court. Id. Finally, the weight given evidence is the exclusive province of the trial court. Tibbs v. State, 397 So.2d 1120 (Fla. 1980), affirmed 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Applying a presumption of correctness, this court should affirm the District Court's decision because there is substantial, and perhaps overwhelming, competent evidence to support the finding of estoppel. Ironically, the trial court may have employed a more stringent standard in assessing the estoppel defense than was necessary. FLANIGAN'S asserted at trial that the evidentiary standard was "clear and convincing" (R. 588). The trial court adopted this standard, but the law in the Fifth District is that an estoppel may be shown by "clear and satisfactory" evidence. See Barber v. Hatch, 380 So.2d 536 (Fla. 5th DCA 1980).[4]

Even applying the most stringent standard of proof required in a civil action, the trial court still found an estoppel existed. This was the same judge who, prior to receiving any evidence, had ruled on partial summary judgment that BARNETT BANK

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[4] The first headnote (Estoppel - 118) to the reported decision may have incorrectly summarized the opinion by reporting the proper standard of proof was "clear and convincing."

had violated §818.01, and was prepared to assess damages if the defenses were not proven.

A. FLANIGAN'S REPRESENTED A MATERIAL FACT THAT IS CONTRARY TO ITS LATER-ASSERTED POSITION BY MAKING A CLAIM TO THE LIQUOR LICENSE BASED UPON AN UNPERFECTED "SECURITY INTEREST" WHICH WAS CLEARLY SUBORDINATE TO BARNETT BANK'S SECURITY INTEREST, AND THEN LATER MAKING A CLAIM BASED UPON A STATUTORY LANDLORD'S LIEN.

Contrary to FLANIGAN'S current assertion, FLANIGAN'S represented a material fact that was inconsistent with its later-asserted position in this action. FLANIGAN'S goes to great lengths in its Initial Brief to argue that it had both a security interest and a landlord's lien on the Liquor License and that these positions are not inconsistent. However, the inconsistency is in the interest claimed by FLANIGAN'S in its dealings with BARNETT BANK.

One type of a recognized estoppel is that arising from a party's taking inconsistent positions with regard to a matter. This type of estoppel is often described as an election. The rule regarding such an estoppel is that, "[a] party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions." 22 Florida Jur. 2d, Estoppel and Waiver, Section 48, P. 475. This type of estoppel is based upon equitable considerations. Id.

This situation is analogous to how parties' claims asserted in a pleading should be treated. For example, the positions of a party are "framed" when the case is at issue and ready for trial. Parties are not permitted to deviate from the issues pleaded, and if a party, for whatever reason, chooses not to

plead a particular claim or defense, it is waived. Just as FLANIGAN'S would not have been permitted to change its theory of the case the day of trial after BARNETT BANK had conducted its pre-trial preparation, so too should FLANIGAN'S not be permitted to alter the "theory" of its claim made before the lawsuit was ever filed. Otherwise, BARNETT BANK will be equally prejudiced.

From the beginning, FLANIGAN'S failed to raise any claim of a landlord's lien against the Liquor License. When FLANIGAN'S entered into the Sublease Agreement with Level III, it specifically obtained a security interest in the Liquor License without mentioning a landlord's lien (R. 675, Ex. 2). FLANIGAN'S, as part of its customary practice, usually tried to perfect that interest by obtaining U.C.C. financing statements from its debtors, but in this case, FLANIGAN'S "dropped the ball" on perfecting its security interest (R. 94). Later when responding to BARNETT BANK about a waiver of any landlord's lien which might exist for the "inventory, furniture and removable fixtures and equipment such as cash registers," FLANIGAN'S stated its landlord's lien against this ["the"] property was the "only security for timely payments" (R. 675, Ex. 7).

The later contact between FLANIGAN'S and BARNETT BANK further demonstrates that FLANIGAN'S only intended to assert a security interest. McMackin testified that Kastner made a claim based upon a security interest which mistakenly had not been perfected (R. 94). At no time during the conversation did Kastner mention a landlord's lien (R. 96). The letters from Kastner that

followed on December 6, 1984, February 5, 1985, and March 14, 1985 (R. 675, Exs. 19, 21, and 22), again emphasized that FLANIGAN'S interest was based upon a security interest, not a landlord's lien.

FLANIGAN'S attempts to argue that it was, at worst, "silent" at to the existence of the basis of its claim of a landlord's lien. The law in Florida is that mere silence does not create an estoppel unless there are special circumstances requiring one to speak. Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514 (Fla. 2d DCA 1967). However, since FLANIGAN'S, through its general counsel, directly contacted BARNETT BANK'S counsel, and they discussed the extent of FLANIGAN'S interest in the Liquor License, one would expect that to be an ideal "special circumstance" to speak.

What FLANIGAN'S based its claim on, not what it could have based its claim on, is a representation of fact, and the evidence clearly and irrefutably shows FLANIGAN'S based its claim on a security interest. The secret, unexpressed intent or understanding of FLANIGAN'S to assert a landlord's lien, which was not communicated to BARNETT BANK, became irrelevant because BARNETT BANK heard and reacted to the claim based upon a security interest.

Contrary to FLANIGAN'S assertions, it may well be that FLANIGAN'S never realized that it could assert a claim based upon a landlord's lien. After all, McMackin, BARNETT BANK'S attorney, testified that he was not aware that a landlord's lien could attach to intangible property such as a liquor license. But if FLANIGAN'S claims it was aware of such a claim, and intended all along to

assert it, though by implication at times, then this raises an even greater question. Why did FLANIGAN'S fail to make a special effort to emphasize this claim? Why was it obscured in the call and numerous letters from Kastner, only later to be unveiled in the Complaint?

B. BARNETT BANK REASONABLY RELIED UPON THE REPRESENTATIONS OF FLANIGAN'S GENERAL COUNSEL THAT ITS CLAIM WAS BASED UPON AN UNPERFECTED SECURITY INTEREST.

Contrary to FLANIGAN'S assertion, BARNETT BANK's reliance upon FLANIGAN'S claim was reasonable. The trial court found that FLANIGAN'S failed to specifically assert a landlord's lien on the Liquor License and that BARNETT BANK reasonably relied on that omission. FLANIGAN'S completely controlled what the basis for its claim to the Liquor License was going to be in its dealings with BARNETT BANK. Even if FLANIGAN'S had a landlord's lien, it could waive that right, i.e. voluntarily relinquish it.

This was not a situation when two parties had equal knowledge, or the same means of ascertaining the truth, as FLANIGAN'S asserts. What was in FLANIGAN'S mind is unique to FLANIGAN'S. The lease documents, even if they had been read by BARNETT BANK, could have lead to the conclusion that FLANIGAN'S was eschewing any landlord's lien rights, or at least was ambivalent about the extent of its rights. And even if BARNETT BANK could have theorized as to what possible basis FLANIGAN'S could assert a claim against the Liquor License, that uncertainty would have been dispelled when Kastner consistently and repeatedly expressed

FLANIGAN'S position that it had a "security interest," without ever mentioning a landlord's lien.

C. BARNETT BANK CHANGED ITS POSITION IN RELIANCE UPON FLANIGAN'S REPRESENTATION BY DISPOSING OF THE LIQUOR LICENSE TO HICKORY POINT.

Contrary to FLANIGAN'S assertion, BARNETT BANK changed its position in reliance upon FLANIGAN'S representations by disposing of the Liquor License. As correctly cited by FLANIGAN'S, a change in position is necessary to prove estoppel. See Boynton Beach State Bank v. Wythe, 126 So.2d 283 (Fla. 2d DCA 1961). The detrimental change in position occurred when BARNETT BANK closed on the transaction and transferred title of the Liquor License to Hickory Point. It is true, as FLANIGAN'S argues, BARNETT BANK'S rights as a secured creditor were "fixed"; but its actions were not. When FLANIGAN'S contacted BARNETT BANK and made a claim based upon a landlord's lien, the bank reacted to this claim and determined that the bank's interest was superior to FLANIGAN'S. It then closed on the transaction, secure in its knowledge and belief that it had the absolute authority to dispose of the Liquor License notwithstanding FLANIGAN'S subordinate claim.

As McMackin testified, had FLANIGAN'S asserted a claim based upon a landlord's lien, he would have researched the issue of priority, and he would have told the bank that it had a problem (R. 103, 104). The closing would not ever have happened but for the representation (R. 104).

Any of a number of scenarios were possible if FLANIGAN's had timely asserted its landlord's lien. For example, BARNETT BANK

could have dealt with its debtor Level III differently, or taken other steps to collect on its loan. Perhaps it could have accepted FLANIGAN's offer to compromise its claims. After all, Kastner had offered $95,000 at one time for the Liquor License. Perhaps it could have even satisfied the landlord's lien for past due rent, which at the time was only about $18,281.55. All of those options were lost by the time BARNETT BANK had sold the Liquor License.

FLANIGAN's repeatedly insists BARNETT BANK's position was no worse after the Liquor License was sold, but the same, if not more, could be said about FLANIGAN's position. Assuming that FLANIGAN's landlord's lien was still intact after the sale, then the buyer, Hickory Point would have held the Liquor License subject to FLANIGAN's interest. Presumably, FLANIGAN's could have recovered the Liquor License and prevented any loss.

III. EVEN IF THIS COURT FINDS THAT BARNETT BANK VIOLATED § 818.01, AND THAT AN ESTOPPEL WAS NOT PROVEN, FLANIGAN'S DAMAGES ARE STILL LIMITED TO THE AMOUNT OF RENT OWING AT THE TIME THE LIQUOR LICENSE WAS REMOVED FROM THE LEASED PREMISES.

BARNETT BANK is compelled to address the issue of the proper measure of damages in the event the Court determines an estoppel was not satisfactorily established and remands this case. The trial court, as a preventive measure, held that the maximum landlord's lien, and hence damages, FLANIGAN'S could have had was for two months' rent ($18,281.55) since there was no acceleration clause in the Sublease Agreement.

The Court's ruling is consistent with the only reported decision interpreting Florida law on the amount of a landlord's lien. In the case of In re J.E. De Belle Co., 286 F. 699 (S.D.

Fla. 1926), the Court, referring to the Florida statute creating landlord's liens, held:

> It would seem obvious that the Florida Legislature had no intention of imposing a landlord's lien for rent for the entire period of the lease contract. Apparently, if not undoubtedly, the intention was to give the landlord a lien for accrued rent on all property of the lessee or sublessee found on the premises or usually kept on the premises for the rent which had accrued . . . . (emphasis added).

FLANIGAN'S reliance on the case of Littman v. Commercial Bank and Trust Company, supra, is inapposite. The Court there held that the proper measure of damages on a claim under § 818.01, was the "remaining balance under the security agreement." Littman, 425 So.2d at 641. This decision actually supports BARNETT BANK'S position.

The most FLANIGAN'S could have realized from the liquidation of the Liquor License was the amount of the two month's rent. All excess proceeds would have belonged to the debtor. If this is the most FLANIGAN'S could have recovered, then its loss is limited accordingly, regardless if the claim under § 818.01 is described as a "tort." FLANIGAN'S claim for unpaid rent totalling $156,000.00 presupposes that somehow it would have owned the Liquor License, which, of course, it did not. There is no guarantee that if the landlord's lien had been foreclosed that FLANIGAN'S would have been the highest bidder and obtained the Liquor License. Therefore, FLANIGAN'S description of the Liquor License as a "valuable asset" is a grave misnomer, and measuring damages upon the total lost value of the Liquor License is inappropriate.

CONCLUSION

The decision of the District Court should be affirmed because §818.01 affords no basis for relief against BARNETT BANK, and because FLANIGAN'S is estopped from asserting a landlord's lien.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail Delivery to Richard E. Whitaker, Esquire, 5127 Andrea Blvd., Orlando, Florida 32807, this 14th day of February, 1994.

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